

Military Matters

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After the Inspection: OSHA Violations & the Appeals Process

By Jack Fearing

*This is the second half of a two-part article reviewing how alleged workplace safety violations can lead to an OSHA compliance inspector visiting your workplace. The **first installment** reviewed the inspection process. Both articles offer valuable information on how to both keep your workplace safe and avoid an unwanted external compliance inspection.*



Alleged workplace safety violations can lead to an OSHA inspector visiting a work site. After the inspection closing conference, the compliance officer will report the findings to the OSHA area director. It is the area director who determines whether OSHA will issue citations and propose penalties. In the meantime, operations will return to normal while the area office determines if any citations—and proposed penalties—will be issued. This process can take 45 to 60 days, and the results will always be received via certified mail. Depending on the results, many possible outcomes and options are available to both the employer and employees.

Citations & Contentions

OSHA has up to 6 months to send a notice of penalty with the inspection results. Once received, one has 15 working days to file an intention to contest OSHA citations and/or to request an informal conference with the

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area director to discuss any citations. The latter is always recommended. The law requires that OSHA citations for safety and health standards violations must include:

- 1) a description of the alleged violation;
- 2) the proposed penalty, if any;
- 3) the date by which the hazard must be corrected.

Common causes to dispute citations include:

- the citation is incorrect (e.g., it is not an accurate representation);
- the citation's dollar penalty is excessive;
- you disagree with the citation's contention that the danger was real, serious and that an incident was likely to occur;
- you do not believe that you are responsible for causing the unsafe conditions (and can contend that).

Citations will inform the employer and employees of the regulations and standards allegedly violated and of the proposed length of time set to correct alleged hazards. Regardless of opinion of the citation, a copy of each citation must be posted at or near the place where a violation occurred for 3 days or until the violation is abated, whichever is longer.

The following are the types of violations that may be cited and the penalties that may be proposed by OSHA.

Other-Than-Serious Violation

This is a violation that has a direct relationship to job safety and health but probably would not cause death or serious physical harm. OSHA may assess a penalty from \$0 to \$1,000 for each other-than-serious violation, but the agency may decrease a penalty by as much as 95% depending on the employer's good faith (demonstrated efforts to comply with the Act), history of previous violations and size of business. The latter generally has the biggest impact.

Serious Violation

This is a violation where there is a substantial probability that death or serious physical harm could result. OSHA assesses the penalty for a serious violation from \$1,500 to \$7,000, depending on the gravity of the violation. OSHA may decrease a penalty for a serious violation as stated in the other-than-serious violation.

Willful Violation

This is a violation that the employer intentionally and knowingly commits. The employer is aware that a hazardous condition exists, knows that the condition violates a standard or other obligation of the Act, and makes no reasonable effort to eliminate it. The minimum willful penalty is \$5,000 for each willful violation, but OSHA may propose penalties of up to \$70,000 for each. An employer who is convicted in a criminal proceeding of a willful violation of a standard that has resulted in the death of an employee may be fined up to \$250,000 (\$500,000 if the employer is a corporation) imprisoned up to 6 months or both. A second conviction doubles the possible imprisonment term.

Repeated Violation

This is a violation of any standard, regulation, rule or order where, upon re-inspection, a substantially similar violation is found and the original citation has become a final order. Repeated violations can bring a fine or up to \$70,000 for each such violation within the previous 3 years. To calculate repeated violations, OSHA adjusts the initial penalty for the size and then multiplies by a factor of 2, 5 or 10, depending on the size of the business.

Failure-to-Abate

Failure to correct a prior violation may bring a civil penalty

of up to \$7,000 for each day that the violation continues beyond the prescribed abatement date.

Additional violations for which OSHA may issue citations and proposed penalties include:

- falsifying records, reports or applications. Upon conviction these can bring a criminal fine of \$10,000, up to 6 months in jail or both;
- violating posting requirements, which may bring a civil penalty of \$7,000;
- assaulting a compliance officer or otherwise resisting, opposing, intimidating or interfering with a compliance officer in the performance of his or her duties, which is a criminal offense and is subject to a fine of not more than \$5,000 and imprisonment for not more than 3 years.

Citations and penalty procedures may differ somewhat in states with their own OSH programs (e.g., state plans). Your state should know which plan applies to your operations.

Multiemployer Work-Site Policy

More than one employer may be citable for hazardous conditions on multiemployer work sites with multiple contractors and/or subcontractors or a general contractor managing a series of contractors. To determine whether more than one employer may be cited, the inspector must follow a two-step process.


The first step is to determine whether the employer is a creating, exposing, correcting or controlling employer. Remember that an employer may have multiple roles. Once the employer's role is determined, the inspector should verify whether a citation is appropriate or not. The inspector must determine if an employer's actions were sufficient to meet obligations. The extent of the actions required varies based on which category applies. The extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees. Only

exposing employers can be cited for General Duty Clause (5.a.1.) violations.

For each type of employer, the two-step process will help the inspector determine whether an action is required.

The Creating Employer

This employer caused a hazardous condition that violates an OSHA standard. Because em-

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employers must not create volatile conditions, an employer that does so is citable even if the only employees exposed are those of other employers at the site.

The Exposing Employer

This employers' employees are exposed to the hazard. If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it:

- 1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition;
- 2) failed to take steps consistent with its authority to protect its employees. If the exposing employer has authority to correct the hazard, it must do so.

If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following:

- 1) ask the creating and/or controlling employer to correct the hazard;
- 2) inform its employees of the hazard;
- 3) take reasonable alternative protective measures.

In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

The Correcting Employer

This employer engages in a common undertaking on the same work site as the exposing employer and is responsible for correcting a hazard. This usually occurs when an employer is given the responsibility to install and/or maintain particular OSH equipment or devices. The correcting employer must exercise reasonable care to prevent and discover violations and meet its obligations to correct the hazard.

The Controlling Employer

A controlling employer has general supervisory authority over a work site, including the power to correct safety and health violations or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice.

A controlling employer must exercise reasonable care to prevent and detect site violations. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as

frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

The Appeals Process

Both the employers and your employees are authorized to appeal the inspection process. There is criteria and timing for both parties.

Employers

If the employer decides to contest a citation s/he must submit a written objection to the area OSHA office within 15 working days of receiving a citation. The OSHA area director forwards the objection to the Occupational Safety and Health Review Commission (OSHRC).

Another option would be to request an informal meeting with the area director to discuss the case, if a citation and notice of proposed penalty is received. The area director may provide more information, and s/he is authorized to enter into settlement agreements that revise citations and penalties to avoid prolonged legal disputes and result in speedier hazard abatement.

If the employer receives a citation, s/he must correct the cited hazard by the abatement date, unless s/he contests the citation or abatement date. However, factors

beyond control may prevent the completion of corrections by that date. In such a situation, if the employer makes a good-faith effort to comply, s/he may file a petition to modify the abatement date.

The written petition must specify the steps the employer will take to achieve compliance, the additional time needed to comply, the reasons additional time is needed and interim steps taken to safeguard employees against the cited hazard during the intervening period. However, the employer must still certify that s/he has posted a copy of the petition in a conspicuous place at or near each place where a violation occurred and that the employee representative received a copy of the petition.

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Employees

If an employee complaint initiates an inspection, the employer or authorized employee representative may request an informal review of any decision not to issue a citation. An active employee involvement program will go a long way to prevent this type of intervention.

Employees may not contest citations, amendments to citations, proposed penalties or lack of penalties. However, they may contest the time allowed for abatement of a hazardous condition. They also may contest an employer's petition for modification of abatement, which requests an extension of the proposed abatement period. They must contest the petition within 10 working days of its posting or within 10 working days after an authorized employee representative receives a copy. Further, employees may request an informal conference with OSHA to discuss any issues raised by an inspection, citation, notice of proposed penalty or employer's notice of intention to contest.

Notice of Contest

As stated, if employees decide to contest the citation, the abatement period or the proposed penalty, they have 15 working days from the time the citation and proposed penalty are received to notify the OSHA area director in writing. Failure to do so results in the citation and proposed penalty becoming final without further appeal options. This written notification is called a notice of contest.

The notice of contest has no specific format. It must clearly identify the basis for filing: the citation, notice of proposed penalty, abatement period or notification of failure to correct violations.

Employees must provide a copy of the notice of contest to their authorized representative. If a recognized bargaining agent does not represent any affected employees, they must post a copy of the notice in a prominent location in the workplace, or personally provide each unrepresented employee with a copy.

If a written notice of contest is filed within the required 15 working days, the OSHA area director forwards the case to OSHRC. The commission is an independent agency not associated with OSHA or the Department of Labor. The commission assigns the case to an administrative law judge. OSHRC may schedule a hearing at a public place near the employer's workplace. Both the employer and employees have the right to participate in this hearing.

Once the administrative law judge has ruled, any party to the case may request a further review by OSHRC. Either party can appeal commission rulings to the appropriate U.S. Court of Appeals.

Finally, contesting may not relieve the employer completely of a penalty, but it may help in negotiating a lesser fine. Contesting is usually a good idea. OSHA typically negotiates with employers, which may result in a lesser penalty amount based on the criteria listed in this article.

The Win-Win

There is really no way to avoid an OSHA compliance inspection, much like there is no way to avoid having an IRS audit. But one can decrease the pain by being well prepared and by fully understanding the process.

Preparation should include ensuring that a comprehensive safety and health program exists and includes all operations and all employees, contractors and visitors. The program should also include provisions for frequent work-site analysis for hazards; a corrective action plan for reducing or eliminating the hazards identified; training; and communications and opportunities for both management and employee participation. This will illustrate how a company is trying to do the right things to protect its employees' safety while they are working. There is potential a win-win situation for everyone involved. ■

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